

EXHIBIT 15

Comments by the New York Legal Assistance Group



August 13, 2019

Via Electronic Submission

**Office of the Secretary
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201**

Re: Docket No.: HHS-OCR-2019-0007; RIN:0945-AA11

Comments in Opposition to Proposed Changes to “Nondiscrimination in Health and Health Education Programs or Activities” Rule

The New York Legal Assistance Group (NYLAG) submits these comments to express its strong objection to the proposed rule regarding ‘Nondiscrimination in Health and Health Education Programs or Activities’ (Proposed Rule) published by the Department of Health and Human Services (HHS) on June 14, 2019.¹ The Proposed Rule substantially alters the ‘Nondiscrimination in Health Programs and Activities’ rule (Final Rule) finalized on July 18, 2016.² The proposed regulation is unlawful, arbitrary and capricious, costly, and a disaster for transgender patients seeking healthcare.

I. Introduction

A. About NYLAG

NYLAG is a not-for-profit legal services organization located in New York City. NYLAG uses the power of the law to help New Yorkers in need combat social and economic injustice. We address emerging and urgent legal needs with comprehensive, free civil legal services, impact litigation, policy advocacy, and community education. NYLAG serves immigrants, veterans, seniors, the homebound, families facing foreclosure, renters facing eviction, low-income consumers, those in need of government assistance, children in need of special education, domestic violence victims, people with disabilities, patients with chronic illness or disease, low-wage workers, low-income members of the LGBTQ community, Holocaust survivors, as well as others in need of free legal services.

NYLAG provides a variety of services to those seeking healthcare through providers. NYLAG’s LGBTQ Law Project provides low-income LGBTQ+ communities with comprehensive legal services for civil issues including family law, name changes, immigration,

¹ See Notice of Proposed Rulemaking, Fed. Reg. 27846-27895; HHS Docket No. HHS-OCR-2019-0007; RIN 0945-AA11 (June 14, 2019).

² See Nondiscrimination in Health Programs and Activities, 81 FR 31375, July 18, 2016.

and civil rights protections. In addition, we run a legal clinic in conjunction with Mount Sinai's Center for Transgender Medicine and Surgery, one of the first medical programs exclusively dedicated to comprehensive care for transgender patients. This legal clinic provides a unique ability to address the needs of transgender patients. Through this work, NYLAG as a whole has represented hundreds of transgender, non-binary, and gender non-conforming clients (TGNC) over the past year. NYLAG works to ensure that low-income TGNC clients and their families, including children, the elderly, and those with disabilities, have access to the medical care that is critical to their survival. TGNC patients confronting illness are some of New York's most vulnerable populations and they struggle to maintain their livelihoods and access to medical care. Compounding the difficulties of access to care is systemic discrimination and a lack of knowledge and understanding within the broader medical community of transgender healthcare and the needs of transgender patients

LegalHealth, created as a division of NYLAG in 2001, is the nation's largest Medical-Legal Partnership, with clinics at 35 hospitals and community health organizations throughout New York City and Long Island, and partnerships with 5 Providing Performer Systems through New York State's DSRIP Program. LegalHealth complements health care with legal care by providing free civil legal assistance to patients in the healthcare setting, serving out-patients, in-patients, and the homebound. The majority of LegalHealth's clients are individuals with chronic and serious illnesses, including cancer, end-stage renal disease, high blood pressure, diabetes, HIV, asthma and heart disease. When social conditions pose a barrier to improved health, the LegalHealth team can use the law to ensure a patient's right to access care, stable housing, and income maximization and immigration remedies. These services are often the determining factor in whether patients will receive the life changing treatment they need. The overall health care system benefits as well: by helping our clients find stability in their lives, our legal services facilitate good health, prevent unnecessary hospital admission and readmission, and lead to a decrease in healthcare spending. Last year, LegalHealth's staff improved the lives of over 7,210 low-income New Yorkers with serious health needs.

B. Summary of NYLAG's Opposition to the Proposed Rule

NYLAG strongly objects to the proposed regulation in every aspect. In particular, NYLAG believes that the following substantive changes proposed in the rule will lead to particularly devastating consequences. Our clients at the New York Legal Assistance Group have experienced the types of discrimination in New York City hospitals that are prohibited under the Final Rule. One client presented in 2014 at an emergency room suffering from kidney stones requiring surgery. Although she identifies as female, staff at the hospital repeatedly misgendered her, identified her sex assigned and birth and by her birth name, claimed she provided false identification, called security and told her to leave. Another client went to a VA hospital after he was assaulted in his car in 2011. The physician did not perform the rape kit or a psychological evaluation. The doctor told the client and wrote in her discharge notes that she did not feel comfortable or qualified to treat him and did not want to continue working with him because he was transgender. She told the client who had just been sexually assaulted to go to a public hospital instead. The client left the hospital and returned the next day, but could not receive a rape kit because he had showered. He has since had several psychiatric hospitalizations as a result of his assault and subsequent experiences.

NYLAG opposes the proposed regulation for numerous reasons, as set forth in more detail below. First, the regulation is unlawful. It arbitrarily and capriciously makes substantial changes to the definitions and scope of several provisions required by the Section 1557 of the Affordable Care Act. It also impermissibly conflicts with the plain meaning of the statute it seeks to effectuate through this regulation. The proposed rule's removal of gender identity protections ignores the plain meaning of "on the basis of sex" discrimination. It strips the protection of rights of vulnerable populations including; transgender, intersex, and disabled patients, or anyone who does not fit a strict definition of white, Christian, heteronormativity.

Second, the interpretation promulgated by HHS relating to the definition of "on the basis of sex" discrimination is a radical departure from settled case law and precedent in the federal system, the common law history of the definition of sex, and the unified consensus of medical professionals and scientists.

Third, and relatedly, the regulation would *not* accomplish its intended purposes. Critically, the oxymoronic title of this proposed rule would serve to severely rollback existing civil rights protections with no proper justification other than inaccurate cost savings borne by those who require language access materials. The citation of pending litigation in *Franciscan Alliance v. Burwell* as the impetus to rollback protections is a preliminary conclusion wanting of a substantive decision. The preliminary injunction issued by Judge Reed O'Connor is not based on a reasoned interpretation of the law and rests on the bigoted assertions of the plaintiffs. The basis promulgated by HHS for repealing gender identity protections have been contradicted throughout the intervening years by several Federal District and Circuit Courts.

Fourth, the proposed regulation could prompt a public health crisis of disastrous proportions, among both TGNC patients and other communities. A rollback of access to care after years of expansion could lead to an increased suicide rate among TGNC patients as they lose their access to care. Public health could also be harmed as the loss of access to care could increase the infection rate of HIV.

Fifth, the proposed regulation would not meet its stated purpose of providing "much needed finality, predictability, administrability, consistency, relief of burdens, and clarity [.]"³ This is especially true regarding the redefinition of covered entities such as "health program or activity". The result will be arbitrary, inconsistent, and unfair application that results from litigation over this pending rule. In addition, the vague nature of the proposed regulation will make it impossible for healthcare providers to reasonably conform their behavior to the rule, which is unfair and unlawful.

Sixth, the proposed regulation would *cost* more money, not save it. It will increase costs for health care and other public-health related costs, and will discourage or preclude TGNC patients from vital access to care. The resulting loss of access will increase overall costs borne by hospitals by increasing costs associated with care for acute medical crises resulting from preventable conditions. Lack of care will be costly in human lives as TGNC patients could be denied urgent lifesaving care and result in costly wrongful death litigation. Additionally, the cited removal of language access requirements will burden immigrants and non-English speakers

³ Proposed Rule, *supra* at note 1

by removing vital requirements to have medical information provided in the most common languages.

Seventh, at a basic human level, the proposed regulation is cruel. It would place countless patients—parents, providers, children, the elderly, those with disabilities—in impossible positions. We should seek to expand access to care as broadly as possible and provide protections to all marginalized communities rather than target them through unlawful regulations that strip them of civil rights protections.

II. A Brief History of Gender Identity in Society and the Common Law

Contrary to the assertions of the Department of Health and Human Services, the definition of sex has always included those who do not identify as the gender they were assigned at birth as well as intersex individuals. The recognition of transgender and intersex people is not a recent development. The history of the common law recognition of multiple sexes and gender expression is wide and varied.

English common law has always recognized that there were more than two sexes. Henry of Bratton, an English judge, was quoted as saying in the 13th century that "[m]ankind may also be classified in another way: male, female, or hermaphrodite."⁴ While the term of hermaphrodite may be outdated, this shows from the earliest development of the common law, there has been recognition for those that do not neatly fit within the gender binary. Going even further in history shows a direct lineage to Roman, Greek, and Semitic thought on the matter.⁵ What we know now as transgender individuals were “then described as hermaphrodites (or, androgynos) and persons ‘of doubtful sex.’ The Mishnahs, Translated Into English With Notes, Glossary and Indices, Vol. 2. (1982), Tractate Bikkurim, Chapter 4 (Bikkurim dates back beyond 1500 B.C.E., the time period at which it was first reduced to written form).”⁶

From the earliest years of colonial America, courts and society have grappled with those who do not fit within the binary definition of sex nor the strict imposition of sex based on physical characteristics. For example, on April 8, 1629, a person named T. Hall appeared before the General Court of the colony of Virginia.⁷ This peculiar and complicated case dealt with the determination of the sex of T. Hall who lived as a woman and a man throughout their life and went by both the name of Thomas and Thomasina at various times.⁸ T was initially determined to be female by the court and was ordered to wear women’s clothing; however, confusion ensued when those who had seen T’s body attested to the court that T was a man. A subsequent inspection of T’s body by other men resulted in a determination of T being a man. Ultimately,

⁴ Bracton: *De Legibus Et Consuetudinibus Anglae*, Bracton, *On the Laws and Customs of England* (attributed to Henry of Bratton, c. 1210-1268).

⁵ Theodore F.T. Plucknett, *A Concise History of the Common Law*, 5th Ed., Little, Brown & Co. (1956) (ISBN: 0-316-71083-0): (“However remote the date at which we start, it will always be necessary to admit that much of the still remoter past that lies behind [the Common Law of England] will have to be considered as directly bearing upon the later history. ... But behind the Roman system were others still more ancient—Greek, Semitic[.]”)

⁶ Causes of Action 2d 135

⁷ Mary Beth Norton, *Founding Mothers & Fathers—Gendered Power and the Forming of American Society*, p. 183-197. Alfred A. Knopf (1996).

⁸ *Id.*

the court composed of the Virginia Governor and council, the highest judicial authority in the colony, accepted T's self-identification as both a man and a woman and that T may wear male clothes but for T to also wear other feminine clothing such as an apron and a coyfe on their head.⁹

In a later case dating to 1878, the Supreme Court of Illinois presided over a case where the validity of a marriage between a cis-man and an intersex person was in dispute.¹⁰ While the underlying matter of the defendant's intersex condition was not factored in to the final decision, it shows additional evidence of courts grappling with the elusive definition of sex.

Outside of the common law, religions have also needed to grapple with those who did not conform to the prevailing understanding of sex. For example, various texts in the Mishna and Talmud recognize six distinct genders of varying physical characteristics: Zachar, Nekeivah, Androgynos, Tumtum, Ay'lonit, and Saris.¹¹ Shi'a Islam has a rich history of debate among Islamic scholars discussing "Mukhannathun," those born male with indeterminate gender, and their interactions with Mohammed in the Hadiths.¹² As a result, transgender individuals are acknowledged and legally recognized by the government of Iran.¹³ In addition, Hijras are recognized as a third gender in Pakistan and they are distinct and relatively large community.¹⁴

All of this history is just a brief sample of the countless times, prior to the modern era, that society and the courts have had to come to terms with the complex nature of human biology and the determination of the definition of sex to include those who don't fit typical notions of male and female. For HHS to state that the Final Rule's definition of sex discrimination to include gender identity as erroneous is itself mistaken.¹⁵ Title IX and other relevant Civil Rights Titles cannot "unambiguously" define sex as the "biological and anatomical differences between male and female" just as the court in colonial Virginia could not define T's gender.¹⁶ The rationale established by HHS is unworkable and will lead to similar cases where a legal gender cannot be determined by an agency. It is best to defer to the patient's gender identity rather than go through painful deliberations to fit patients into two arbitrary categories that they cannot accurately be defined by.

⁹ *Id.*

¹⁰ *Peipho v. Peipho*, 88 Ill. 438, 1878 WL 9902 (1878)

¹¹ "Terms for Gender Diversity in Classical Jewish Texts," Transtorah.org, Available at http://transtorah.org/PDFs/Classical_Jewish_Terms_for_Gender_Diversity.pdf.

¹² Hendricks, Muhsin *Islam and Homosexuality*). *ILGA's preconference on religions July 2006*). Available at <http://doc.ilga.org/content/download/4522/27322/version/1/file/ILGA-July06-Religions.pdf>

¹³ Alipour, M (2016). "Islamic shari'a law, neotraditionalist Muslim scholars and transgender sex-reassignment surgery: A case study of Ayatollah Khomeini's and Sheikh al-Tantawi's fatwas". *International Journal of Transgenderism*. 17:1: 91–103.

¹⁴ Stephen O. Murray and Will Roscoe "Conclusion". *Islamic Homosexualities: Culture, History, and Literature*. NYU Press. p. 305 (1997).

¹⁵ Proposed Rule, *supra* at note 1, at 27848 ("The district court held that the Department had adopted an erroneous interpretation of "sex" under Title IX, and that the regulation was also arbitrary and capricious for failing to incorporate Title IX's religious and abortion exemptions.")

¹⁶ *Id.*

III. The Proposed Rule Ignores Substantial Case Law Establishing Sex Discrimination to Inherently Include Gender Identity and Sex Stereotypes

Section 1557 of the Affordable Care Act inherently prohibits sex discrimination, including discrimination based on sex stereotypes, gender expression, or gender identity. Section 1557 expressly incorporates four federal civil rights statutes, which outline the protected grounds of discrimination: race, color, and national origin (under Title VI); sex (under Title IX); age (under the ADEA); and disability (under the Rehabilitation act). Several courts have concurred that the statutory Section 1557 protections for “on the basis of sex” logically encompass protections for gender identity.¹⁷

A. The Interpretation of Title IX in Constructing the Interpretation of Sex Discrimination in the Current Regulation is Valid

The proposed rule stated that “Interpreting Section 1557, through Title IX, to prohibit gender identity discrimination was a relatively novel legal theory when HHS adopted the Final Rule.”¹⁸ This is an invalid determination of the Final Rule’s reasoning, as it is not a novel legal theory, neither at the time nor currently. Title IX had already been found to include protections for sex stereotypes and logically included those and gender identity in its rule.¹⁹ Agencies may look to a variety of sources such as the legislative record, other agency determinations, court precedent, and policy experts in its construction of a statute when faced with an ambiguous term.²⁰ Since the rule was first promulgated, Title IX has been shown to explicitly encompass gender identity protections.²¹ This is particularly so in the interpretation of Section 1557 by other courts. Subsequent litigation has completely affirmed this that Title IX protects transgender people. In the recent decision granting summary judgement in *Grimm v. Gloucester County School Board*, on August 9, 2019, the court found that:

“[E]very court to consider the issue [Title IX transgender protections] since May 22, 2018 has agreed with the analysis relied

¹⁷ *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 952 (D. Minn. 2018) (Holding that ACA Section 1557 prohibits discrimination on the basis of gender identity); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F.Supp.3d 1090, 1098-1100 (S.D. Cal. 2017) (holding that Section 1557 extends to claims of gender identity based on its plain language); *Flack v. Wis. Dep't of Health Servs.*, Civ. No. 18-309, 328 F.Supp.3d 931, 940–50, 2018 WL 3574875, at *12-13 (W.D. Wis. July 25, 2018); *Rumble v. Fairview Health Servs.*, Civ. No. 14-2037, 2017 WL 401940, at *3 (D. Minn. Jan. 30, 2017); *Cruz v. Zucker*, 195 F. Supp. 3d 554, 581 (S.D.N.Y.), on reconsideration, 218 F. Supp. 3d 246 (S.D.N.Y. 2016) (Holding that Medicaid’s categorical exclusion of treatments and procedures for the treatment of gender dysphoria as discriminatory)

¹⁸ Proposed Rule, *supra* at note 1, at 27852-27853

¹⁹ *Miles v. New York Univ.*, 979 F.Supp. 248, 250 n.4 (S.D.N.Y. 1997) (It is established that the Title IX term “on the basis of sex” is interpreted in the same manner as similar language in Title VII. *See, e.g., Murray v. New York University College of Dentistry* (2d Cir.1995) 57 F.3d 243, 249 (“in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII”).); *See also Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260, 200 L. Ed. 2d 415 (2018) at 1048; *Grimm v. Gloucester Cty. Sch. Bd.*, (E.D. Va. 2019);

²⁰ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984) (Holding that “the question for the court is whether the agency's answer is based on a permissible construction of the statute.)

²¹ *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730 (E.D. Va. 2018) (“[A]s a matter of first impression, claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory under Title IX”).

upon by this Court. *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518,530 (3d Cir. 2018) (stating that a policy forcing transgender students to use separate facilities “would very publicly brand all transgender students with a scarlet ‘T,’ and they should not have to endure that as the price of attending their public school”); *Adams by & through Kasper v. Sch. Bd.of St. Johns Cty.*, 318 F. Supp. 3d 1293,1325 (M.D. Fla. 2018) (holding that “the meaning of ‘sex’ in Title DC includes ‘gender identity’ for purposes of its application to transgender students” and that the transgender student proved a Title DC violation where a school board denied him from using male restrooms, causing him harm) appeal docketed[^] No. 18-13592 (11th Cir. Aug. 24,2018); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1106 (D. Or. 2018)(“Forcing transgender students to use facilities inconsistent with their gender identity would undoubtedly harm those students and prevent them from equally accessing educational opportunities and resources. Such a... District policy would punish transgender students for their gender nonconformity and constitute a form of sex-stereotyping.”) appeal docketed[^] 18-35708(9th Cir. Aug. 23,2018). *Grimm v. Gloucester Cty. Sch. Bd.*, (E.D. Va. 2019).²²

HHS’s prior reliance on Title IX to establish gender identity as a protected class has been repeatedly affirmed by courts at all levels. HHS properly determined that Title IX jurisprudence and statutory construction should inform the definition of “on the basis of sex” to include gender identity and sex stereotypes in the Final Rule. HHS now contends that such a determination is invalid despite there being clear precedent on the matter to enlighten statutory construction. HHS in its proposed rule instead follows the baseless assertion by Judge O’Connor that HHS was not entitled to Chevron deference. This is a reckless abdication of HHS’s responsibility to determine and interpret ambiguous statutes to the judiciary, when no determination has been made on the merits. HHS’s present contention that Title IX regulations exclude gender identity and sex stereotypes is a legal conclusion made in ignorance of surrounding court precedent and jurisprudence.

B. The Definition of Sex Discrimination Promulgated by HHS Ignores Other Agency Determinations and Court Precedent of Title VII of the Civil Rights Act

HHS may also look to Title VII to help enlighten the construction of “on the basis of sex.” The Supreme Court in *Franklin v. Gwinnett County Public Schools* rejected an argument against the prohibition of using Title VII to apply by analogy to Title IX’s antidiscrimination provisions.²³ Since then, courts have commonly looked towards the interpretations of on the “on

²² *Grimm v. Gloucester Cty. Sch. Bd.*, (E.D. Va. 2019) citing *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518,530 (3d Cir. 2018); *Adams by & through Kasper v. Sch. Bd.of St. Johns Cty.*, 318 F. Supp. 3d 1293,1325 (M.D. Fla. 2018); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1106 (D. Or. 2018).

²³ *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 65, 112 S. Ct. 1028, 1032, 117 L. Ed. 2d 208 (1992)

the basis of sex” to enlighten their analysis of the term when looking to apply canons of statutory construction towards provisions in the Civil Rights Titles. Prior to the implementation of the Final Rule in 2016, the courts had already established a significant amount of precedent that established transgender status and gender identity as inherently protected by Title VII.²⁴

In adding Section 1557 to the Affordable Care Act, Congress intended for relevant agencies to incorporate Titles VI, Title VII, Title VIII, and Title IX into its definitions of discrimination.²⁵ Title VII has long had a significant role in determining protections for employees against sex discrimination and every court that has examined the issue has found that Title VII protects gender identity.²⁶ In 2011, the EEOC issued an administrative decision in *Macy v. Holder* finding that a complaint “based on gender identity, change of sex, and/or transgender status is cognizable under Title VII.”²⁷ The Equal Employment Opportunity Commission (EEOC) has subsequently investigated and brought cases on the basis of gender identity.²⁸ This proposed rule goes even farther than contradicting these precedents, case law, and agency determinations; it ignores the bedrock principle of sex discrimination by removing sex stereotype protections established by the Supreme Court in *Price Waterhouse v. Hopkins*.²⁹ The Supreme Court affirmed this expansive view of Title VII in *Oncale v. Sundowner Offshore Services, Inc.*, in which the court stated that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”³⁰

Title VII cases of employment discrimination have offered the clearest examples yet of sex discrimination encompassing gender identity. Multiple circuit courts have weighed in and determined that gender identity and transgender status is explicitly protected under the prohibitions of discrimination on the basis of sex.³¹ In *Glenn v. Brumby*, the 11th Circuit found that “[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”³² This holding

²⁴ *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Roberts v. Clark Cty. Sch. Dist.*, 215 F.Supp.3d 1001, 1014 (D. Nev. 2016), reconsideration denied, No. 2:15-cv-00388-JAD-PAL, 2016 WL 6986346 (D. Nev. Nov. 28, 2016) (Holding that discrimination against a person based on transgender status is discrimination “because of sex” under Title VII.); *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509, 527 (D. Conn. 2016); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F.Supp.2d 653, 660 (S.D. Tex. 2008); *Schroer v. Billington*, 577 F.Supp.2d 293, 305 (D.D.C. 2008).

²⁵ *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 952 (D. Minn. 2018) (Holding that ACA Section 1557 prohibits discrimination on the basis of gender identity)

²⁶ *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572 (6th Cir. 2018) (The court found “an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.”); *E.E.O.C. v. Rent-A-Center East, Inc.*, 264 F.Supp.3d 952, 956 (C.D. Ill. 2017)

²⁷ *Mia Macy*, EEOC DOC 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012)

²⁸ *Id.*

²⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (Holding that sex stereotypes are a form of sex discrimination).

³⁰ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998)

³¹ *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (“[A] label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (holding that a transgender individual stated a claim for sex discrimination under the Equal Credit Opportunity Act)

³² *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011)

by the 11th Circuit was based on the determination of several courts prior to the instant case.³³ The most recent and high profile case is that of the *EEOC v. RG & GR Harris Funeral Homes*.³⁴ The 6th Circuit held that “discrimination on the basis of transgender and transitioning status violates Title VII.”³⁵

Even more directly, courts have addressed the construction of the term “on the basis of sex” under Section 1557 in the course of Title VII litigation.³⁶ The most instructive of these cases was *Tovar v. Essentia Health* which found that the ACA prohibits discrimination on the basis of gender identity.³⁷ The District Court found that the employer, Essentia Health, and the third party administrator, Health Partners, violated Section 1557 for denying coverage of treatments and procedures for gender dysphoria. The insurance plan in *Tovar* excluded coverage for treatments and procedures for gender dysphoria. The court found that the categorical exclusions were discriminatory on the basis of gender identity. In its reasoning, the district court stated:

“By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.” *Whitaker*, 858 F.3d at 1048; *see also Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”). Courts have therefore recognized a cause of action under Title VII for sex discrimination based on gender identity and gender-transition status, e.g., male-to-female, female-to-male.” [Emphasis added]³⁸

Again and again, courts have looked to the issue to construct the term “on the basis of sex” and repeatedly concluded that it implicitly encompasses protections for gender identity and transgender status as an extension of the sex stereotyping doctrine.

IV. The Proposed Rule Violates the Administrative Procedures Act

Under the Administrative Procedure Act §706(2)(A), a court shall determine an agency’s policy change unlawfully arbitrary and capricious when an agency does not provide “the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choices made.’”³⁹ Under this standard, interpreted by the Supreme Court in *Motor Vehicle Manufacturers Association v. State Farm* and employed by the Court again in its 2019 term, an agency’s cogent and reasoned analysis must: 1) sufficiently

³³ *Id.*

³⁴ *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574-575 (6th Cir. 2018) cert. granted in part sub nom. *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019)

³⁵ *Id.*

³⁶ *Tovar v. Essentia Health*, *supra* at note 23.

³⁷ *Id.* at 952.

³⁸ *Id.*

³⁹ *Dept. Comm. v. New York*, 139 S.Ct. 2551, 2569 (2019) quoting *Motor Vehicle Mfrs. Assn. of US Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

explain factual findings on which it relied to make its policy change; 2) sufficiently explain the connection between factual findings and the policy decision; and 3) explain pre-existing policy alternatives and reasons the agency, following an examination of evidence, decided against these alternatives.⁴⁰

A. The Proposed Rule Unlawfully Ignores the Impact on Transgender Individuals, Who Have Developed a Serious Reliance Interest On Section 1557 of the Affordable Care Act

The agency erroneously finds that serious reliance interests do not exist for transgender individuals whose health care provisions were regulated by the Final Rule, because the Northern District of Texas enjoined enforcement of the Final Rule before the first plan year in which it would have applied.⁴¹ The relevant part of the Proposed Rule states that:

“The Department does not know what effect the Final Rule, in conjunction with the court injunction, has had on benefit design with respect to coverage of gender identity-related treatments. It, therefore, does not have enough information to estimate effects from the proposal to repeal of the Final Rule’s benefit design requirements. The Department believes, however, that because a Federal court enjoined enforcement of the Section 1557 Regulation before the start of the first plan year in which the Final Rule would have applied, that beneficiaries of the expanded gender identity provisions could not have developed a reliance interest on the enjoined parts of the rule.”⁴²

Ignorance of the Proposed Rule’s impact against the reliance interest of transgender patients is not an excuse for ignoring the impact that the Proposed Rule would have. The assumption that the enjoined Final Rule had no effect is woefully misinformed and ignorant of the current realities of transgender care. HHS made no meaningful attempt to inquire and analyze the changes in coverage for transgender patients and the implementation of non-discrimination policies. Most egregiously, the Proposed Rule redefines a covered entity to exclude private insurance providers, as well as federally funded exchange insurance plans.

1. Transgender Patients Are Disproportionately Discriminated Against In Medical Settings and Suffer Adverse Outcomes as a Result

There are an estimated 1.4 million Americans who identify as transgender.⁴³ All of these individuals will need health care at some point in their lives.⁴⁴ Many trans identified people will

⁴⁰ (*State Farm, Independent US Tanker Committee v. Dole*).

⁴¹ Proposed Rule, *supra* at note 1, at 27886

⁴² *Id.* at 27886.

⁴³ Andrew R. Flores et al., The Williams Institute, *How Many Adults Identify as Transgender in the United States?* (June 2016). <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as->

be more likely to need care than the average of the United States population, due to a need for life-saving medical attention such as hormone therapy or surgery, gender affirming care and heightened experiences of violence, clinical depression, anxiety, and suicidality.⁴⁵

Transgender people require routine and life-saving care as much, if not more, than other portions of the United States. As a result of social and economic marginalization, transgender people experience clinical depression, anxiety, and serious psychological distress at significantly higher rates (39%) than the United States population average (5%).⁴⁶ Forty percent (40%) of transgender individuals have attempted suicide in their lifetime and seven percent (7%) have attempted suicide in the past year, nearly nine and twelve times the national averages (4.6% and 0.6%), respectively.⁴⁷ Nearly five times the number of transgender individuals than the national average are living with HIV (1.4% compared with 0.3%).⁴⁸ These rates are higher among transgender women (3.4%) especially transgender women of color; nearly one in five (19%) black transgender women surveyed by one analysis was living with HIV.⁴⁹

Transgender people regularly experience discrimination while attempting to obtain routine and life-saving care related to the conditions above, their gender transitions, and other health care needs. In the 2015 U.S. Transgender Survey (conducted prior to the 2016 Regulation), one-third (33%) of transgender individuals reported at least one negative experience related to being transgender in health care, such as being verbally harassed, sexually or physically assaulted, or refused treatment.⁵⁰

Trans and gender-non conforming (TGNC) people are regularly denied access to health care or provided substandard health services due to discrimination by health care providers and insurance policies.⁵¹ The 2011 National Transgender Discrimination Survey found that at least 19% of individuals were refused care altogether due to their transgender or gender non-conforming identity (with higher rates among people of color).⁵² Nearly thirty percent (28%) were subjected to harassment in medical settings, and 2% were victims of violence in a doctor's office.⁵³ Denials and instances of discrimination occurred in doctor's offices, hospitals, emergency rooms, mental health clinics, by EMTs, and in drug treatment programs.⁵⁴ Twenty-

Transgender-in-the-United-States.pdf.

⁴⁴ See *NFIB v. Sebelius*, 567 U.S. 519, 591-592 (2012), Ginsberg dissenting.

⁴⁵ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M., *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality (2016).
<https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁴⁶ The National Center for Transgender Equality (NCTE), *The Report of the 2015 US Transgender Survey*, at p. 5, Available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

⁴⁷ *Id.*

⁴⁸ *Id.* at p. 6

⁴⁹ *Id.* at p. 10

⁵⁰ *Id.*

⁵¹ Center for American Progress, "Discrimination Prevents LGBTQ People from Accessing Health Care," January 18, 2018. <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>

⁵² The National Center for Transgender Equality (NCTE), *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, at p. 6, Available at https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf

⁵³ *Id.* at p 72.

⁵⁴ *Id.* at p. 73.

eight percent (28%) of individuals postponed needed medical care due to discrimination.⁵⁵ A 2018 study found that being denied a greater number of services and being discriminated against in more settings was associated with lower levels of treatment in transgender adults.⁵⁶ A quarter of respondents in a 2017 study reporting that they have avoided doctors or health care due to concern they would be discriminated against.⁵⁷

Health service denials for transgender patients correlated with increased rates of coping-motivated substance use and elevated rates of attempted suicide.⁵⁸ Transgender and GNC adults face barriers to health care that may be due to a variety of reasons, including discrimination in health care, health insurance policies, employment, and public policy or lack of awareness among health care providers on transgender-related health issues.⁵⁹ Such barriers to health care would only increase with the elimination of protections against gender based discrimination in health care.

The implementation of these anti-discrimination standards by HHS is essential to the lives and wellbeing of TGNC communities. Currently, discrimination in health care prevents TGNC patients from receiving the healthcare they desperately need or care that would keep them healthy.⁶⁰ In 2010, prior to the implementation of section 1557 of the ACA barring discrimination due to gender identity in health care, 70% of TGNC patients reported experiencing some type of discrimination while seeking health care services.⁶¹ HHS should be increasing and protecting transgender and gender non-conforming people's access to healthcare and while widening providers' ability to provide such care. In order to do this successfully, HHS must fully enforce Section 1557, the anti-discrimination provision of the ACA to include gender identity and sex stereotype protections.

2. HHS Arbitrarily and Capriciously Ignored the Proposed Rule's Impact on Transgender Patient's Serious Reliance Interest

HHS relies on a flawed interpretation of the necessary standard of review for determining when citing *FCC v. Fox*, which held that an agency changing its existing position "need not always provide a more detailed justification than what would suffice for a new policy created on

⁵⁵ *Id.* at p. 6

⁵⁶ Administration and Policy in Mental Health, "Examining Mechanisms and Moderators of the Relationship between Discriminatory Health Care Encounters and Attempted Suicide Among U.S. Transgender Help-Seekers," November 2018. <https://www.ncbi.nlm.nih.gov/pubmed/29574543>

⁵⁷ National Public Radio, Robert Wood Johnson Foundation, Harvard T.H. Chan School of Public Health, "Discrimination in America: Experiences and Views of LGBTQ Americans," November, 2017. <https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>

⁵⁸ Administration and Policy in Mental Health, "Examining Mechanisms and Moderators of the Relationship between Discriminatory Health Care Encounters and Attempted Suicide Among U.S. Transgender Help-Seekers," November 2018. <https://www.ncbi.nlm.nih.gov/pubmed/29574543>

⁵⁹ Gilbert Gonzalez, Carrie Henning-Smith, "Barriers to Care Among Transgender and Gender Nonconforming Adults," December 11, 2017. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5723709/>

⁶⁰ Center for American Progress, "Discrimination Prevents LGBTQ People from Accessing Health Care," January 18, 2018. <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>

⁶¹ Lambda Legal's Survey on Discrimination against LGBT People and People Living with HIV, "When Health Care isn't Caring," 2010. https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring_1.pdf

a blank slate.” HHS does not complete the full analysis required.⁶² In *Fox*, in the sentence following that which the agency cited, the Supreme Court held that an agency must provide a more detailed justification for its change in policy when its prior policy has resulted in serious reliance interests.⁶³ The court noted that “[i]t would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.

Several organizations such as Mt. Sinai’s Center for Transgender Medicine, with whom we partner with to provide legal services for transgender patients, have relied on the expansion of coverage for transgender individuals under Section 1557 to provide services for transgender patients. Several hospitals could lose significant revenue and potentially be forced to shutter programs if coverage is once again restricted for transgender individuals under the proposed rule.

Data suggests health care providers and insurers have adapted their policies to the explicit anti-discrimination provisions of the Final Rule prior to the injunction. Additionally, several court cases, such as *Cruz v. Zucker*, and *Tovar v. Essentia Health* have expanded access using the Section 1557 statute as a basis.⁶⁴ There would be a catastrophic and detrimental impact on the health and well-being of transgender patients as a direct result of the Proposed Rule. An analysis of discrimination complaints received by CMS prior to the Texas injunction found that the majority of trans patients filing complaints had been discriminated against or denied routine care, solely because of their gender identity.⁶⁵ A later analysis of ACA individual market plans for 2017-2019 found that 90% of plans did not include exclusions of transgender related care or gender dysphoria.⁶⁶ The high number of plans without exclusions is a rapid change from the time before the ACA when gender dysphoria treatment was routinely excluded. Additionally, the Final Rule went into effect in July 18, 2016 and was only enjoined in December 31, 2016. Nearly every plan has open enrollment prior to this date and the plans must be designed prior to this time. In 2016, NYLAG’s own health insurance coverage through Oxford removed the requirement of supplemental coverage for gender dysphoria and implemented standard coverage for gender dysphoria, although with some exclusions still in place.

At the same time these protections are still necessary. At least 19% of individuals were refused care altogether due to their trans or gender non-conforming status and almost thirty percent of these individuals (28%) were subjected to harassment in medical settings.⁶⁷ Taken

⁶² Proposed Rule, *supra* at note 1, at 27850 citing *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009).

⁶³ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009).

⁶⁴ *Cruz v. Zucker*, 195 F. Supp. 3d 554, 581 (S.D.N.Y.), on reconsideration, 218 F. Supp. 3d 246 (S.D.N.Y. 2016) (Holding that Medicaid’s categorical exclusion of treatments and procedures for the treatment of gender dysphoria as discriminatory)

⁶⁵ Sharita Gruberg, *The ACA’s LGBTQ Nondiscrimination Regulations Prove Crucial*, Center for American Progress (March 7, 2018). <https://www.americanprogress.org/issues/lgbt/reports/2018/03/07/447414/acas-lgbtq-nondiscrimination-regulations-prove-crucial/>

⁶⁶ Katie Keith, *HHS Proposes To Strip Gender Identity, Language Access Protections From ACA Anti-Discrimination Rule Health Affairs*, (May 25, 2019). <https://www.healthaffairs.org/doi/10.1377/hblog20190525.831858/full/>.

⁶⁷ Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. Washington: National Center for

together, this data indicates trans individuals have been regularly discriminated in and barred from general provisions of health care. Accordingly, as physicians and payers have adapted their policies to conform to the Final Rule, transgender patients have developed serious reliance interests on the explicit gender identity protections which protect them from discrimination in accessing health care.⁶⁸

The Final Rule sets out procedural and substantive protections against discrimination on the basis of protected classes by health care programs receiving federal assistance, administered by the Department of Health and Human Services (HHS), or established by the Affordable Care Act (ACA).⁶⁹ Currently, such “covered entities,” such as hospitals and State Medicare providers, and insurers must treat individuals consistently with their gender identity and cannot categorically deny them access to health services, facilities, or coverage because of their gender.⁷⁰

HHS must provide sufficient factual findings and a sufficient explanation of its rationale for removing explicit protections of gender identity, which would reduce transgender, gender non-conforming, and intersex individuals’ access to health care. As written, the Proposed Rule does not provide sufficient factual bases or explanations for its policy change. Without administratively sufficient factual or policy explanation, the Proposed Rule is an arbitrary and capricious regulatory change that harms the serious reliance interests of transgender patients. The Proposed Rule will open the door for continued discrimination of trans identified people as well as confusion as to which standard prevails in the state and local municipalities that have developed their own protections.

3. HHS Ignores the Significant Costs That Will Be Incurred by Healthcare Providers and Transgender Patients

Conflicting rules will increase cost to providers and increase private litigation. Failure to provide a proper standard of care is malpractice regardless of whether the health care provider denied care due to one’s gender identity. Currently 19 states and Washington D.C. ban insurance exclusions for transgender healthcare.⁷¹ The American Medical Association ethics rules clearly state that, “Physicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity or any other

Transgender Equality and National Gay and Lesbian Task Force, (2011).
https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

⁶⁸Katie Keith, *HHS Proposes To Strip Gender Identity, Language Access Protections From ACA Anti-Discrimination Rule Health Affairs*, (May 25, 2019).
<https://www.healthaffairs.org/doi/10.1377/hblog20190525.831858/full/>.

⁶⁹*Nondiscrimination in Health Programs or Activities*, 81 FR 31375 (Proposed on May 18, 2016).
https://www.federalregister.gov/documents/2016/05/18/2016-11458/nondiscrimination-in-health-programs-and-activities?utm_campaign=subscription+mailing+list&utm_medium=email&utm_source=federalregister.gov.

⁷⁰Katie Keith, *HHS Proposes To Strip Gender Identity, Language Access Protections From ACA Anti-Discrimination Rule Health Affairs*, (May 25, 2019).
<https://www.healthaffairs.org/doi/10.1377/hblog20190525.831858/full/>.

⁷¹Human Rights Campaign, “*State Maps of Laws and Policies: Transgender Healthcare*,” January 15, 2019. <https://www.hrc.org/state-maps/transgender-healthcare>

basis that would constitute invidious discrimination.”⁷² Many states and localities explicitly prohibit discrimination based on gender identity and sexual orientation in public accommodations, which includes health services provided by physicians, hospitals, and other health service providers. The following 17 states have explicit protections: California, Connecticut, Colorado, Delaware, Hawaii, Illinois, Iowa, Maryland, Maine, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington State, as well as the District of Columbia.⁷³ More than 200 cities and counties also explicitly prohibit gender identity discrimination even if their state does not.⁷⁴

Private medical malpractice suits are expensive for practitioners which is a cost passed down to patients. More than a third of physicians have had a claim filed against them at some point in their careers and the average expense incurred on medical liability claims that closed in 2015 was \$54,165.⁷⁵ In 2015, 68.2 percent of all closed claims were dropped, dismissed, or withdrawn; however, each of these claims costs an average of \$30,475 to defend.⁷⁶ Eliminating gender discrimination protections from section 1557 conflicts with many state and local laws, and will put providers at greater risk for medical malpractice and discrimination litigation which overrides any miniscule cost benefit from eliminating the current protections.

The Proposed Rule states their novel definition of sex discrimination would allow for efficiency, flexibility, and cost-effectiveness, but does not account for increased litigation in its analysis. Additionally, the private right of action for specific instances of discrimination is still reserved by patients. As a result, patients who experience discrimination will be able to engage in federal litigation against providers that discriminate regardless of the Proposed Rule. As a result, medical providers will be liable for costly federal litigation due to conflicting liability under HHS’ proposed rule. Instead of providing a more expedient and efficient manner of dispute resolution through administrative complaints with the Office of Civil Rights, HHS instead shifts the burden back to the courts where significant case law has developed showing a private right of action under Section 1557.

One such example occurred in 2015, where a 14 year old transgender boy admitted to the hospital with suicidal ideations was repeatedly misgendered and harassed by hospital staff and eventually released early without proper treatment.⁷⁷ The boy subsequently committed suicide as a direct result of the treatment he received.⁷⁸ A court found that the hospital was liable under Section 1557 for discriminating on the basis of gender identity.⁷⁹ Litigation such as this could

⁷² American Medical Association, Code of Medical Ethics, “Chapter 8: Opinions on Physicians & the Health of the Community: Disparities in Health Care” <https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/code-of-medical-ethics-chapter-8.pdf>

⁷³ Trans Equality, “Know Your Rights: Public Accommodations,” 2019. <https://transequality.org/know-your-rights/public-accommodations>

⁷⁴ *Id.*

⁷⁵ American Medical Association, Jose R Guardado, PhD, Policy Research Perspectives, “Medical Liability Insurance Indemnity Payments, Expenses and Claim Disposition, 2006-2015,” 2018 <https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/public/government/advocacy/policy-research-perspective-liability-insurance-claim.pdf>

⁷⁶ *Id.*

⁷⁷ *Prescott v. Rady Children's Hospital-San Diego*, 2017 U.S. Dist. LEXIS 160259 (S.D. Cal. Sept. 27, 2017).

⁷⁸ *Id.*

⁷⁹ *Id.*

continue under the current interpretation of Section 1557 by the courts. The Proposed Rule ignores this possibility and the removal of explicit protections creates confusion that will place providers in greater legal liability while also diminishing the immediate remedies available to transgender patients.

B. The Proposed Rule Radically Redefines ‘Covered Entities’ and ‘Principally Engaged in the Business of Providing Healthcare’ To Exclude Health Insurers

The Final Rule sets out procedural and substantive protections against discrimination on the basis of protected classes by health care programs receiving federal assistance, administered by the Department of Health and Human Services (HHS), or established by the Affordable Care Act (ACA). Currently, such “covered entities,” such as hospitals and State Medicare providers, and insurers must treat individuals consistently with their gender identity and cannot categorically deny them access to health services, facilities, or coverage because of their gender.

Section 1557 states in 42 U.S. Code 18116 (a), that “any health program or activity” is covered by anti-discrimination portion of the statute. The Proposed Rule inexplicably incorporates the standard of determining covered entities from the Civil Rights Restoration Act of 1987 (CRRA) without any basis to do so.⁸⁰ This results in defining health insurance companies as not being primarily in the business of healthcare which ignores the plain meaning of the statute. As quoted above, the relevant portion states “any health program or activity.” A textualism analysis and the plain meaning of the term would immediately show that health insurance companies would constitute a health program or activity. Additionally, there is no indication that Congress intended for the CRRA to apply to Section 1557 as there would be no need to include Section 1557 in the first place if Title VI protections, as amended by the CRRA, already existed. HHS has impermissibly abrogated Section 1557 by bringing in the CRRA standard to a statute that was designed to expand civil rights protections.

C. The Proposed Rule Arbitrarily and Capriciously Redefines the Definition of Discrimination on the Basis of Sex

The Proposed Rule eliminates explicit definitions of discrimination on the basis of sex, including the Final Rule’s distinction of gender identity as a category of sex protected against discrimination.⁸¹ This change removes the legal protected classes, specific protections of benefits, and specific protections against discrimination by health care providers on the basis of gender identity.

The Proposed Rule erases the identities of intersex and transgender people. It substitutes an irrational unsubstantiated, and erroneous view that sex is solely based on biological and anatomical differences but fails to state what exactly those differences are. As noted previously in the case of *T. Hall*, determining sex is anything but unambiguous and simple. The Proposed rule cited that “sex and sexual refer to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and

⁸⁰ Proposed Rule, *supra* at note 1, at 27862

⁸¹ *Id.* at 27846

nonambiguous internal and external genitalia,” and stated that any “differences between males and females [are] binary and biological.”⁸² However, this fails to capture the complexity of sex within a biological construct. By referring to sex as binary and biological, the Proposed Rule has created an impossible and unworkable standard. Even at a biological standpoint, there is no neat definition of what constitutes a man or a woman.

If one were to look solely towards the factors cited by HHS, this would be entirely reductive and unmanageable. It is taken for granted by HHS that sex can solely be determined on genetics, genitalia, and sex hormones. For instance, many intersex individuals are born with genitalia inconsistent with their genetics such as those with XX Male Syndrome who are genotypically women but are phenotypically male.⁸³ How would HHS characterize sex discrimination against such an individual? Another example would be those with Swyer Syndrome where they have XY chromosomes and an SRY deletion which results in phenotypical female features. One woman with Swyer Syndrome was able to give birth to a healthy baby girl.⁸⁴ Again, how would HHS characterize sex discrimination against such an individual? Sex hormones can oftentimes fail to distinguish sex characteristics due to Androgen Insensitivity Syndrome. Finally, there is recent research showing that the neurological configuration of transgender brains match not of their birth sex but of the gender they identify as.⁸⁵ Even with all of these examples, each individual born intersex often identify with a different gender than what either their genetics, genitalia, or sex hormones would indicate. Reliance on these factors to determine sex when analyzing a case of discrimination is in and of itself, an impermissible use of sex stereotypes which is prohibited under current Supreme Court precedent.

Each and every factor listed by HHS fails and has significant exceptions due to genetic and biological diversity among the population which results in a model of sex being closer to a bimodal distribution rather than a simple binary. HHS lays out no manner of dealing with discrimination on the basis of sex when someone’s sex is indeterminable according to the factors cited. It would just be easier and far less intrusive to the privacy of patients if they can just simply self-attest their gender identity than to deal with the layered and extremely complex nature of sex. HHS believes that by citing biological sex in its Proposed Rule from miscellaneous research guidelines, it is being backed up by science in its prejudiced view that transgender individuals should not enjoy federal civil rights protections. However, at every turn, the medical science contradicts and indicates that the term “biological sex” is unambiguous and workable as a definition for discrimination protections.

⁸² Proposed Rule, *supra* at note 1, at 27854

⁸³ Parada-Bustamante, Alexis; Ríos, Rafael; Ebersperger, Mauricio; Lardone, María Cecilia; Piottante, Antonio; Castro, Andrea (2010-11-01). "46,XX/SRY-negative true hermaphrodite". *Fertility and Sterility*. 94 (6): 2330.e13–2330.e16. doi:10.1016/j.fertnstert.2010.03.066. ISSN 0015-0282. PMID 20451191

⁸⁴ Jyoti Taneja, David Ogutu, and Michael Ah-Moye, “Rare Successful Pregnancy In A Patient With Swyer Syndrome.” *Case Rep Womens Health*. 2016 Oct; 12: 1–2. Published online 2016 Oct 18. doi: 10.1016/j.crwh.2016.10.001

⁸⁵ Mohammadi MR, Khaleghi A. “Transsexualism: A Different Viewpoint to Brain Changes”. *Clin Psychopharmacol Neurosci*. 2018;16(2):136–143. doi:10.9758/cpn.2018.16.2.136

V. Health and Human Services is Impermissibly and Unconstitutionally Motivated by Hatred and Animus Towards Transgender People

Agencies are given wide latitude to construct interpretations of ambiguous statutes as long as they are not arbitrary and capricious under the Administrative Procedures Act. Additionally, agencies are cannot promulgate rules where the pretext for the change is animus towards a protected group. As courts have noted, transgender individuals are protected under the Equal Protection Clause of the 14th amendment and are due intermediate scrutiny when assessing actions that harm them.⁸⁶

It cannot be emphasized enough how much of an outlier the decision to grant a nationwide preliminary injunction in *Franciscan Alliance v. Burwell* is. As previously detailed above, several federal circuit and district courts have established that gender identity is inherently protected under provisions prohibiting discrimination on the basis of sex. However, HHS is seemingly obsessed with adhering to the preliminary and non-substantive determinations of Judge O'Connor in the Northern District of Texas rather than its own reasoned interpretation established in 2016. This is a complete abdication of HHS' authority and independence to implement administrative regulations based on reasoned statutory construction. It begs the question as to why HHS would defer to an outlier decision to inform the entire basis of its proposed rule.

HHS claims that the Final Rule somehow superseded its authority in making that determination despite well-developed precedent determining that indeed, Title VII and Title IX's protections include gender identity and transgender status.⁸⁷ HHS consistently and repeatedly cites the *Franciscan Alliance v. Burwell* case as the sole basis for determining that HHS superseded its authority.⁸⁸ This is no accident as HHS is desperate to point towards favorable precedent and yet can only find one case, the alleged impetus for rewriting this rule. This is because HHS chose not to defend the rule and appeal to the 5th Circuit. Due to the unique nature of the preliminary injunction, intervenors on the case have not been joined while HHS considers a new rule.⁸⁹ This entire basis for rulemaking process for the proposed rule relies on a flimsy pretext created by the HHS' own decision to not defend the Final Rule.

The only change since the Final Rule was finalized was a change of administration and the inauguration of President Trump. The current administration has consistently shown animus towards transgender individuals and believes they do not deserve civil rights protections. The stated purpose of resolving the *Franciscan Alliance* case is a pretext to obscure the real motivations of HHS, particularly those of Director of the Office of Civil Rights Roger Severino,

⁸⁶ *Supra* Note 20, at p. 749 (Finding that intermediate scrutiny applies under the Equal Protection Clause); *See also Whitaker*, 858 F.3d at 1051; *Glenn*, 663 F.3d at 1321.

⁸⁷ *Proposed Rule, Supra note 37*, at 27848.

⁸⁸ *Id.*

⁸⁹ *Franciscan Alliance, INC.; v. Burwell*, Secretary of the United States Department of Health and Human Services; and United States Department of Health and Human Services, Defendants., 2016 WL 5934533 (N.D.Tex.) Proposed Intervenors' Reply In Further Support Of Motion To Bifurcate Intervention And Suspend Briefing on the Merits. Available at <https://www.aclu.org/legal-document/franciscan-alliance-v-price-proposed-intervenors-reply-motion-bifurcate-intervention>

which is a deep seated animus and hatred of the transgender community.⁹⁰ Director Severino has repeatedly harnessed hateful and harmful rhetoric against the transgender community by misgendering transgender individuals and promoting prejudiced tropes.⁹¹ Such rhetoric in New York State in the course of practicing law would subject Director Severino to ethical rules violations.⁹² It is clear from this record that HHS cannot promulgate new rules stripping transgender individuals of civil rights protections when its own director has shown such blatant disdain and disregard for transgender individuals.

VI. Conclusion

For all the reasons cited above, NYLAG vehemently opposes the Proposed Rule.

Respectfully Submitted,

Alejandra Caraballo, Esq.
Staff Attorney, LGBTQ Law
Project
212-613-5000

Rose-Emma Lunderman
Intern, LGBTQ Law Project

Lara Russo
Intern, LGBTQ Law Project

⁹⁰ Roger Severino, *Pentagon's Radical New Transgender Policy Defies Common Sense*, July 1, 2016. (Mr. Severino used bigoted tropes against transgender service members by stating "biological men should not be allowed into the same barracks and showers as women."). Available at <https://www.cnsnews.com/commentary/roger-severino/pentagons-radical-new-transgender-policy-defies-common-sense>; Roger Severino, *Commentary: Court should reject Obama's radical social experiment*, November 7, 2016. (Purposely misgendered Gavin Grim, a transgender man as "a gender-dysphoric teen girl in Virginia sued her school district to get full access to the boys'athrooms.") Available at https://www.inquirer.com/philly/opinion/20161107_Commentary_Court_should_reject_Obama_s_radical_social_experiment.html; Roger Severino, *Pentagon's Radical New Transgender Policy Defies Common Sense*, July 1, 2016. (Mr. Severino used bigoted tropes against transgender service members by stating "biological men should not be allowed into the same barracks and showers as women."). Available at <https://www.cnsnews.com/commentary/roger-severino/pentagons-radical-new-transgender-policy-defies-common-sense>

⁹¹ *Id.*

⁹² 22 NYCRR Part 1200, Rule 8.4 (g) ("A lawyer or law firm shall not. . . unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, gender identity, gender expression, disability, marital status or sexual orientation.